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Supreme Court of the United States

OCTOBER TERM, 1939

No. 28

CITIES SERVICE OIL COMPANY, *Petitioner*

vs.

B. P. DUNLAP, ET AL

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

Reply Brief of Petitioner

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FORT WORTH BRIEF PRINTING CO., 308 1-2 W. 12TH ST. 2-4070

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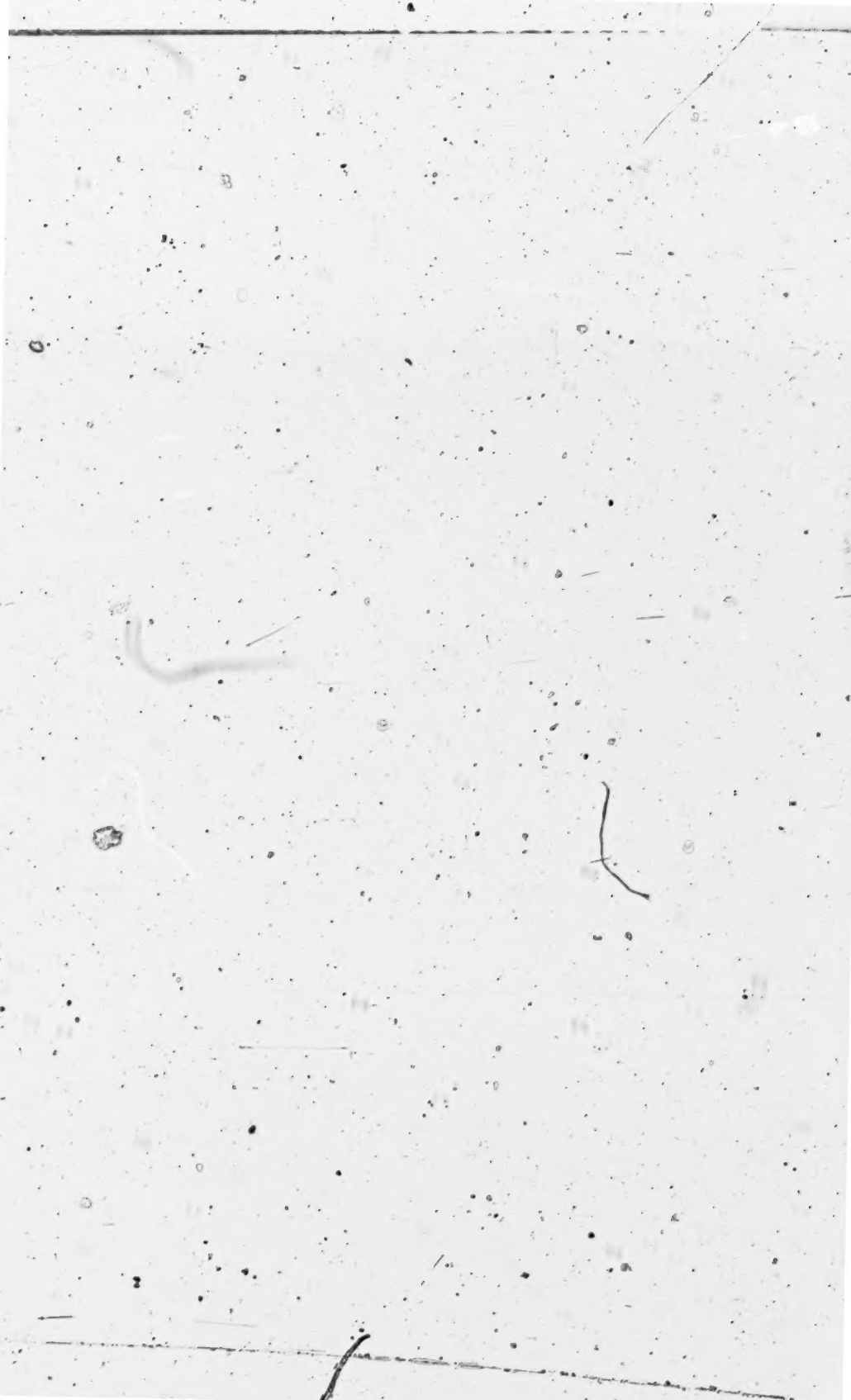

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Reply Brief of Petitioner

Respondents are in an anomalous position before this court by asking the affirmance of a decision of the Circuit Court of Appeals, but in so doing urging this court to reject the essential and controlling reasons assigned by the Circuit Court in its opinion rendering a decision favorable to them.

More than fifty pages of their brief are devoted to a fallacious argument that it was unnecessary and improper for the Circuit Court of Appeals to decide upon whom rested the burden of proving petitioner was an innocent purchaser *vel non*, although respondents urge that the Circuit Court correctly held they were entitled to introduce parol testimony to establish their mistake in inserting in the partition deed

of 1899 a call for the Wiley Davis Northeast corner which, if not inserted mistakenly, divested them of all their title to the land in controversy, and invested title to the oil and gas leasehold estate in petitioner.

It is now apparent to respondents that the Circuit Court of Appeals erred in holding that they were entitled to a reformation and correction of the partition deed, which had been of record more than thirty years at the time petitioner acquired its title to the oil and gas leasehold estate, and in assigning as a reason therefor that petitioner had not discharged the burden of proving it was an innocent purchaser of the land in controversy, and in holding on rehearing that the Federal Court need not follow the Texas rule placing on one claiming an equitable title arising out of a mistake in executing an instrument, the burden of pleading and proving the holder of the legal title was a mala fide purchaser, and in assigning as a reason therefor that the Texas decisions create rules of practice or procedure and not matters of substantive law. Being in this dilemna respondents urge this court to strike down as *dicta* everything the Circuit Court of Appeals said about the burden of proof being on petitioner to establish it was an innocent purchaser of the property in controversy.

As stated by the Circuit Court, respondents "by cross bill set up that a call in the deed to J. F. Rogers 'for the Wiley Davis Northeast corner' as the Northwest corner of the J. F. Rogers tract was inserted by the draftsman through inadvertence and mistake."

Respondents plead:

> "And if the deed in fact now calls for the Wiley Davis corner, the same is called for **by mistake,** and the surveyor actually on the ground did not run the line to such corner, **if the said corner was other than at 880 yards West of the Northwest corner of the Thomason Survey."** (R. 31.) * * *
>
> "That the deed was not then immediately prepared, **but when prepared if the call for Wiley Davis corner is in the deed same was put in by inadvertence and mistake,** and the line as actually surveyed on the ground did not go to the Wiley Davis corner, if said corner was or is any other place than 440 yards West of said Northwest corner of Block No. 1" (R. 34).
>
> * * * *
>
> "being established at a point 68 feet East of the line claimed by plaintiff in plaintiff's amended bill of complaint, **this being left out by the surveyor at the request of the Rogers family for a road, to be jointly owned and controlled by the parties to said partition."** (R. 35.)

The Circuit Court correctly construed the trial court's findings of fact and conclusions of law when it stated that:

> *"The District Court held that extrinsic evidence * * * was admissible * * * and that the reference to the Wiley Davis corner was inserted in the deed by mistake."*

Petitioner urged in the Circuit Court of Appeals, as disclosed by the opinion, "that the mistake, if any,

was not correctible against bona fide purchasers," and the court said:

> **"In the present case, the scope of the admissible evidence is enlarged by the pleaded issue that the reference to the Wiley Davis corner got into the deed through mistake. On that issue, the case being in equity, parol and other extrinsic evidence of what was done and said was plainly admissible.** The court properly heard the testimony of persons who were present at the survey and it clearly showed that the Northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length East of the Wiley Davis corner so as to leave a strip undivided, and under the control of all four tenants in common for the purposes of a road. * * * The evidence was admissible, and it well warranted the finding of the Judge that the reference to the Wiley Davis corner as the corner of Lot No. 2, was inserted by mistake in drafting the deed."

In the trial court, petitioner objected to the parol evidence of F. E. Rogers, that while the survey was being made, the surveyor told the heirs there was a chain left (meaning it was a chain to the Wiley Davis Northeast corner) and the heirs advised him they would keep the strip like it was, it then being used for a road at that time of the year. (R. 220, 222.) Petitioner urged that such testimony was incompetent in view of the call for the Wiley Davis corner, and it varied the terms of the written instrument. (R. 220.)

Based on such testimony the trial court found that such conversation occurred while the survey was be-

ing made in 1899 (R. 63) and concluded as a matter of law: "that the call for the Wiley Davis corner in the partition deed of 1899 and subsequent instruments following such deed call, should be rejected as inserted by mistake." (R. 70.)

Based on the findings of fact and conclusions of law the trial court reformed, by the decree entered herein, the description of the land included in petitioner's oil and gas lease by cancelling the call for the Wiley Davis Northeast corner. (R. 56.)

To the action and ruling of the court petitioner excepted and assigned error (R. 305-311) and fully briefed in the Circuit Court of Appeals the propositions based on such assignments (Appellant's brief Circuit Court of Appeals, pp. 107-146).

In petitioner's brief in the Circuit Court of Appeals some twenty-five pages were devoted to a discussion of the Texas decisions supporting and settling the proposition that the legal title to the strip of land to the Wiley Davis Northeast corner passed to petitioner, leaving respondents with only an equitable title arising out of their alleged mistake in including more land than they intended to convey.

The opinion of the Circuit Court of Appeals unquestionably shows that they were of the opinion that petitioner owned the legal title to the strip in controversy, but held respondents were entitled to correct their mistake in including the call for the Wiley Davis Northeast corner because petitioner did not prove it was a bona fide purchaser. The crux of the decision was the court's determination that petitioner

had not discharged the burden of proving it was a bona fide purchaser, and is accordingly overruled each of the assignments of error that petitioner was entitled to a decree quieting its title to the strip of land because it owned the legal title and respondents failed to plead and prove it was a mala fide purchaser. In overruling the assignments of error the Circuit Court said:

> "But appellant argues that equity will not correct a mistake as against a bona fide purchaser for value without notice, and that there is no proof that it and its predecessors in the lease were not such. The answer is that there is no sufficient proof that they were. In the law of negotiable instruments presumptions are indulged as to bona fides and want of notice, but in equity a claim to the favored position of a bona fide purchaser for value without notice is a matter of affirmative defense, and he who asserts it has the burden of proving it. Compare United States vs. California & Oregon Land Co., 148 U. S. 31. *It fairly appears that these lessees paid value in developing the lease, but there is no evidence at all that at the time they paid they did not know that the west line was not the east line of Davis, or that the call for 440 yards on the north line would not reach Davis' corner, rendering the corner questionable.* No well was drilled or expenditures made on this disputed strip. There being no proof of bona fides or want of notice, this plea was not sustained. The district judge held the evidence touching the intention of the parties to be admissible on the ground that the deed was am-

> biguous irrespective of the equitable power to correct a mistake in the deed. The cases cited above go far to sustain him, but we find it unnecessary to determine that question in view of the equitable issues pleaded." (Italics ours.)

Petitioner challenged the correctness of the holding of the court above through its motion for rehearing (R. 341-363) urging that under Texas decisions the burden of proof was on respondents to plead and prove petitioner was not a bona fide purchaser (R. 346-348) and that under *Erie Railroad Company v. Tompkins*, the Texas decisions were binding on the Federal Courts (R. 352-353). The original opinion on rehearing was withdrawn for correction (R. 364) after petitioner had filed a second motion for rehearing (R. 370-390), urging that the Texas rule created matters of substantive law and should be followed by Federal Courts under *Erie Railroad Co. v. Tompkins* (R. 380-386).

The motion for rehearing was overruled (R. 397), the court writing a corrected opinion (R. 392-396), stating:

> "The motion for rehearing asserts that in the Texas courts the rule is established that on an issue of bona fide purchase for value without notice the burden of proof is upon him who attacks the legal title and asserts the equity, citing White v. Hix, 104 S. W. (2d) 136; and the contention is made that under the ruling in Erie R. R. Co. v. Tompkins, — U. S. —, the State law should have been applied in this court.
>
> "In 66 C. J. Vendor and Purchaser, sec. 1063,

we find the Texas rule, supported by a multitude of Texas cases, stated as above, but as being exceptional. The rule elsewhere, also supported by abundant authority, is said to be: 'As a general rule the person relying on the defense of a bona fide purchase for value without notice has the burden of proving such defense.' The federal courts have held according to this general rule."

* * *

"This seems to us a matter of practice or procedure and not a matter of substantive law. There is no question as to what are the rights of a bona fide purchaser, or as to whether the facts established make complainant out such, but only a question of how and by whom the facts shall be shown to the court. Such matters are not within the decision in Erie R. R. Co. v. Tompkins, and the cases following it. At the very time these decisions were made, the Supreme Court was putting forward procedural rules to govern uniformly in the courts of the United States the practice in both law and equity cases, and was extending them even to questions of the admissibility of evidence and the competency of witnesses. Rule Civil Procedure 43. The procedure in equity cases has always been governed by a practice uniform over the United States and independent of that in the State courts. This was held proper in federal courts in Louisiana where as in Texas there are no separate courts of equity. Livingston v. Story, 9 Pet. 631, Story v. Livingston, 13 Pet. 358.

"We have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply

what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling."

The Circuit Court did not overrule petitioner's assignments of error challenging the admissibility of parol testimony to correct a mistake in the deed when the rights of innocent purchaser had intervened on any ground other than that petitioner had not shown it was an innocent purchaser, and in so doing the court stated it was following the weight of authority, although Texas decisions were to the contrary. In dealing with what is *dictum* this court said, in *Florida Central Railroad Company v. Schutte*, 103 U. S. 118:

> "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here, the precise question was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended." (103 U. S. p. 143.)

Again, in *Union Pacific Co. v. Mason City Co.*, 199 U. S. 160, the court said:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in re-

spect thereto can, in no just sense, be called mere dictum." (199 U. S. 166.)

Respondents now urge this court to hold that legal title to the strip in controversy never passed to petitioner because the partition deed and oil and gas lease were ambiguous and parol evidence was admissible to show a mistake was made by them in inserting the call for the Wiley Davis Northeast corner. They countered with this same proposition in the Circuit Court of Appeals, after petitioner herein had filed a brief containing one hundred eighty-eight pages, quoting from the record and discussing Texas decisions holding that the legal title to all the land to an adjoinder called for in a deed vests in the grantee, and if grantor made a mistake in inserting the call for adjoinder, his title is equitable, and he cannot defeat the legal title without pleading and proving the holder of the legal title was a mala fide purchaser. The Circuit Court of Appeals, after considering the authorities cited by petitioner, held that in view of the equitable issues pleaded by respondents, a court of equity had power to correct their mistake because petitioner had not plead and proved it was a bona fide purchaser. Unlike the decisions quoted from above, the Circuit Court of Appeals did not dispose of the case upon some ground other than that discussed in its opinion, *a fortiori*, what the court said about the burden of proof being on petitioner was not *dictum*, but was the court's reason for overruling the assignments of error presented by petitioner in its brief.

Statement Correcting Inaccuracies In Respondents' Brief

A general charge that a brief contains inaccurate statements, without citing portions of the record supporting such charge, is contrary to the rules of this court, and is of no aid to the court in passing on the correctness of the statement. Petitioner made a statement of the case, citing each paragraph and page of the record in support thereof, and its opening statement substantially follows the opinion of the Circuit Court of Appeals, but respondents throughout their brief have hurled general charges without citing the record in support thereof, that petitioner has misstated the record. We feel that such charges should be cautiously made and, whenever made, portions of the record should be cited in support thereof.

Typical of the general charges made by respondents without citing the record, is that contained in the first paragraph on page four to the effect that petitioner's contentions of fact are not supported by the record and foreclosed against it by the findings and holdings of the court below. We are not asking this Court to review the trial court's findings. We say there was placed on petitioner a greater burden than Texas decisions warrant.

We believe we are justified in resenting the accusations made by respondents, and they certainly do not merit consideration of this court for, if they were true, respondents would have cited the record to support the charges carelessly made against petitioner.

In the last paragraph on page five of their brief, respondents state that "the trial court held the cor-

rection lease" naught and void because secured by false representation and fraud and without consideration (Findings of Fact, ¶ 17, page 78; Conclusions of Law, ¶ 4, page 71.)

On page seventy-four respondents devote one of their points to the charge that petitioner has exhibited that character of bad faith in equity, both towards respondents and the court in a matter having immediate and necessary relation to the equity sought by it, as would deny it remedy in a court of equity. Under such point they state that the correction or affirmation lease was obtained by stealth, false representations, fraud and swindle and by criminal means; that lessors executed said so called "confirmation lease" divesting them of the leasehold estate of the land in controversy herein, wholly without consideration. Respondents further falsely represent to this court on page seventy-five that the trial court held "such confirmation lease void as fraudulently acquired."

There is nothing further from the truth than the above statements by respondents. They have been driven to the point of having to charge fraud on the part of petitioner in an effort to support the decision of the Circuit Court.

The opinion of the Circuit Court refutes respondents' charge that the confirmation lease was obtained by fraud wherein the court said:

> "Appellant has a second lease made after a resurvey and containing a differently worded description and it was executed on the assurance

that it covered nothing that was not covered by the first lease, and we agree with the ruling made below that it ought to be given no different effect."

The record shows that the original lease was executed only by the heirs of J. F. Rogers to W. P. Chandler on October 20, 1930 (R. 138), and assigned by Chandler to Empire Gas & Fuel Company on October 21, 1930 (R. 172), the Cities Service Oil Company having thereafter succeeded to the rights of Empire Gas & Fuel Company (R. 49-50, 93).

In April, 1931, Empire Gas & Fuel Company had a survey made of the land covered in its lease, its surveyor being accompanied by J. E. Rogers, one of the heirs of J. F. Rogers, deceased, who pointed out the corners to the surveyors (R. 144).

After completing the survey it was discovered that the two acre tract known as the Mings Tract in the Northwest corner of the J. F. Rogers Tract No. 2, had not been definitely carved out and the Empire Gas & Fuel Company prepared a correction or confirmation lease and presented it to the heirs of J. F. Rogers for signature (R. 161). The Empire Gas & Fuel Company assured the heirs of J. F. Rogers that the confirmation lease included no additional land and they signed it. (R. 169-171.)

Petitioner plead the execution of the confirmation lease (R. 24), calling it a "confirmation lease," thereby showing that it did not contend the lease covered any land in addition to that described in the original lease.

If the partition deed of 1899 did not cover and include the 66 foot strip, then the title remained with the four heirs of Louisa Rogers, which evidences the fact that petitioner was not trying to acquire rights greater than that covered by the original lease, because it had the confirmation lease signed only by those persons executing the original lease. There was certainly no fraud in obtaining a confirmation lease which petitioner never contended covered more land than was described in the original lease.

We are amazed at respondents' statement the trial court found the confirmation lease was void because it was obtained by stealth, false representation, fraud and swindling. Respondents cite paragraph 17, Record page 62, and paragraph 4, Record, page 71, to support their charge and an examination by the court of this portion of the record will be convincing that Respondents have falsely made charges of fraud, unsupported by the record.

The other portion of the record cited by respondents to support their charge is paragraph four of the conclusion of law, wherein the trial court stated:

> "Furthermore, when the complainant, Empire Gas & Fuel Company, represented to the heirs of J. F. Rogers that their correction lease did not cover any more land than the original lease, and thereby obtained the same, it is in no position now to claim otherwise in an equitable action." (R. 71.) * * *
>
> "The correction lease, not taking in more land than the original lease, could not be extended on

> the West and also extended at the Southeast corner, to the East, 68 feet." (R. 72.)

Mr. Cox, a witness called by petitioner, who represented its predecessor in title in obtaining the correction lease, testified he told the heirs of J. F. Rogers that the correction lease called for the same amount of acreage as the original lease (R. 171).

In petitioner's brief in the Circuit Court of Appeals, it stated that it did not contend the correction lease covered more land than the original lease.

Respondents continuing their misstatements and false accusations, state on page seventy-four of their brief in this court:

> "Said lessors executed said so called 'confirmation' lease, divesting themselves of the leasehold estate of the land in controversy herein wholly without consideration."

They have stated that they divested themselves of the leasehold estate of the land in controversy, by executing the correction lease, apparently thinking the confirmation lease covered the 66 foot strip, but petitioner has not claimed it got more land under the confirmation lease than it acquired under the original lease, and if respondents are correct in stating the confirmation lease divested them of the title, then the original lease likewise did. The trial court and the Circuit Court of Appeals held that the confirmation lease covered no more land than the original lease; that such was the representation of the agents of the Empire Gas & Fuel Company and petitioner

did not contend to the contrary. The statement of respondents, on page seventy-five of their brief, that the trial court held the confirmation lease void and fraudulently acquired, is false. The Circuit Court did not decide the case on fraud, and no questions of fraud are before this Court.

Respondents' charges are so ridiculous that they are almost ludicrous. It is consoling, though, to know that respondents have not confined their charges of misquoting the record solely to petitioner, for on page forty-two of their brief, they state the Circuit Court of Appeals misquoted the trial court's findings when it stated that:

> "The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the Northwest corner of lot No. 2 was deliberately and purposely put about a chain's length East of the Wiley Davis corner, so as to leave a strip undivided and under the control of all four tenants in common **for the purpose of a road.**"

We find respondents before this court, disputing the statement by the Circuit Court that the strip was left undivided and under the control of the four tenants **for the purposes of a road.** When they filed their answer in the trial court they plead:

> "Defendants further show that in 1899, when the said north line was actually surveyed on the ground, the line was stopped at 440 yards west of the northwest corner of Lot No. 1, **purposely and so that the original Rogers owners could at all times have an outlet from the North to the**

main public road leading from Gladewater and the west, to Longview, the County site, and to the east on to Shreveport, Louisiana; said public road being some half mile south of the north end of the Rogers 176-acre tract. The Rogers family were hauling logs and timber from the north of said 176 acre tract and other land to the north, **and purposely left a strip on the west side unpartitioned, so that at all times they would have an open outlet, as aforesaid;** and there was no intention to include said strip in said 66 acre tract or to partition same in any respect. And there was no intention to include it in the ratification lease now claimed by plaintiff," (R. 34-35.)

" * * * the northwest corner, as established on the ground, and the southwest corner, as established on the ground, being established at a point 68 feet east of the line claimed by the plaintiff in plaintiff's amended bill of complaint, **this being left out by the surveyor at the request of the Rogers family for a road to be jointly owned and controlled by the parties to the said partition."** (R. 35.)

The Honorable Circuit Court adopted respondents' theory that the 66 foot strip was set aside for the purposes of a road, and respondents, seeing the correctness of petitioner's contention under Texas authorities that title to the strip passed to petitioner because it bounded the tract partitioned to J. F. Rogers, and was to be used for road purposes, now attempt to change their entire theory of the case by saying that the strip was simply omitted from the partition, rendering inapplicable the road doctrine.

Inconsistencies In Respondents' Theories

The record in this case in the trial court was unavoidably long because of the inconsistent positions taken by respondents. They contended to-wit:

(a) The location of the Wiley Davis Northeast corner was not known at the time of the partition survey in 1899, and they denied that it was a well established corner. (R. 30, ¶ IV.)

The burden therefore was on petitioner to show the location of the corner, which it did, and the trial court found the corner was located where petitioner contended (R. 63).

In fact, respondent, F. E. Rogers testified that he knew, in 1899, the location of the Wiley Davis Northeast corner, being familiar with the place where the pine tree stood at the Davis corner. (R. 225.) He testified he knew where the Davis' East line was and there were marked trees along it. (R. 225-226.) The testimony of F. E. Rogers, which the trial court admitted over petitioner's objection, showed that the surveyor and the Rogers' heirs knew in 1899 the location of the Northwest corner of the tract being partitioned, and knew that it was located 880 yards plus 66 feet West of the Northeast corner of the Thomason Survey. Had respondents followed rules of equity procedure by admitting in their answer they knew the location of the Davis corner, as they did, the record in this case would have been simplified.

(b) Respondents further plead that if the court should determine that in 1899 the Wiley Davis cor-

ner was well located on the ground, nevertheless, in making the survey, the surveyor stopped short of the corner 66 feet and the call for the corner was inserted in the partition deed through their mistake. (R. 31.)

(c) They answered that when the survey was made in 1899, the surveyor never ran the West line of the tract partitioned to J. F. Rogers, their allegation being "that the West line South was not run on the ground, or any other of the lines but same was calculated." (R. 34, ¶ IX.)

Directly contrary to such pleading, F. E. Rogers testified that the surveyor ran the West line (R. 222). They even plead:

> "Said Wiley Davis corner was not fixed or located or susceptible of definite ascertainment at the time in 1899 and has not been capable of definite ascertainment since said time and being incapable of definite ascertainment, the call for 440 yards controls." (R. ¶ IX, p. 34.)

This pleading was inserted for the purpose of confusing the issues and extending the record, and the falsity thereof is shown by their own admissions pointed out above.

(d) To further confuse the issues, respondents plead that the Rogers heirs never owned the 66 foot strip but the strip was owned by the Moseley heirs (R. ¶ XII, p. 36), they contending that subsequent to the time they executed the oil and gas lease held by petitioner, they acquired the Moseley title to the

strip. The court also found against them on that contention. (R. ¶ XIV, p. 67.)

(e) To further confuse the issues, respondents answered that if they did not own the strip claimed by petitioner, then they owned a strip along the East side of its lease (R. 41-43) but the court found these facts against them (R. 70-71).

Reply to Respondents' Contention That Title to the Strip Did Not Pass Even Though It Was Set Aside for Road Purposes and Bounded the Tract Partitioned to J. F. Rogers

The Texas rule of property is that a conveyance of land bounded by a public highway carries with it the fee to the highway as part and parcel of the ground and "Such is the legal construction of the grant unless the inference that it was so intended is rebutted by the **express terms** of the grant." (*Mitchell v. Bass*, 26 Tex. 372, 380.) In the original brief filed in this court, the Texas authorities are discussed, and are numerous in holding that the presumption is conclusive unless title to the road is expressly reserved in the deed. Respondents, on page fifty-four of their brief, state "that the presumption relied upon by petitioner is not a conclusive presumption or rule of law" but they cite no Texas authority to support such statement. "Strip hunters" have been so numerous in Texas that the courts have established a rule of property that the presumption is conclusive in the absence of an express reservation in the deed.

Petitioner has cited many Texas authorities holding that failure to mention the road does not militate against the conclusive presumption, and respondents

in reply state that the Texas decisions are inapplicable where the road is not called for as a boundary, but cite no authority to support their contention. The Texas authorities cited and quoted from on page thirty-two of petitioner's brief follow the majority rule in holding that failure to mention the street or highway does not prevent the operation of the rule that title passes.

It is also contended by respondents on page fifty-two of their brief, that title to the strip did not pass because the strip was not a road. In an equitable action a defendant is bound by his pleading, and plaintiff is not required to prove facts admitted or plead by the defendant.

Respondents plead:

> "Defendants further show that in 1899, when the said north line was actually surveyed on the ground, the line was stopped at 440 yards west of the northwest corner of Lot No. 1, purposely and so that the original Rogers owners could at all times have an outlet from the north to the main public road leading from Gladewater and the west to Longview, the County site, and to the east on to Shreveport, Louisiana; said public road being some half mile south of the north end of the Rogers 176 acre tract. The Rogers family were hauling logs and timber from the north of said 176 acre tract and other land to the north, and purposely left a strip on the west side unpartitioned, so that **at all times** they would have an open outlet, as aforesaid; and there was no intention to include said strip in said 66 acre tract or to partition same in any respect. And

there was no intention to include it in the ratification lease now claimed by plaintiff." (R. 34-35, ¶ X) * * *

"Defendants further aver that at the time the partition was made of the Rogers land referred to in plaintiff's bill and also in this answer, the Rogers family, desiring to leave a strip on the west side for an open road * * *." (R. 35, ¶ XI) * * *

"this being left out by the surveyor at the request of the Rogers family **for a road,** to be jointly owned and controlled by the parties to the partition." (R. 35, ¶ XI.)

While it is true that some of the testimony showed the Western edge of the 66 foot strip was being used for a road, it was undisputed that from sometime prior to the partition in 1899 to the discovery of oil in the East Texas field "the road had been open for the use of anyone who wanted to travel it" (R. 223-224).

Mr. Simmons (not the surveyor) called by respondents, testified:

"The road meanders back and forth in between those trees and at the exact spot I do not know whether there is any road or not. The road would wash on one side and then they would get on the other side." (R. 246.) "The road is traveled one place one time and another place another time." (R. 244.)

Mr. Sport, another witness called by respondents, testified:

"The fences must have been at least sixty or seventy feet apart but the road did not take up all the land, however. The road was cut out twenty-five, thirty or forty feet wide. It did not go plumb straight when it was originally cut out. Davis' fence was back ten, fifteen or twenty feet from the West line of the road. * * * Wiley Davis had a fence on the West side of the road running clear up to the school house lot. I do not think, in 1930, before the road was widened, Davis and Rogers' fences were within forty-five feet of each other. I did not measure them. **I was road overseer and people went over the road. In my judgment they were sixty or seventy feet apart. After the fences were put there the road was widened."** (R. 239-240.) * * * **"It was almost in the road. The road wobbled quite a little bit."** (R. 241.)

We do not consider it material that the travel did not cover the 66 feet because the public had the right to use the 66 feet since it had been set aside for road purposes according to respondents' own pleadings and admissions. In fact, Texas authorities and decisions from other jurisdictions are numerous holding that title to the strip set aside for road purposes passes, even though the road was never opened or abandoned. (See original brief, p. 38.)

If there are Texas cases to support respondents' contention, it certainly seems that they would have been able to find them but their failure to do so, as well as the omission by the Circuit Court of Appeals of such authorities, evidences the fact that the Texas

rule is not subject to the exceptions applied by the Circuit Court.

What the Circuit Court Said About the Burden of Proof Being a Matter of Procedure Is Not Dicta

Respondents, in an effort to avoid the application of the doctrine of *Erie Railroad Company v. Tompkins* and *Central Vermont Railway Company v. White*, contend that it was not necessary for the Circuit Court to decide whether the burden of proof was on petitioner to plead and prove it was a bona fide purchaser or on respondents to plead and prove petitioner was a mala fide purchaser. To support their position, they have cited cases like *Blake v. Pure Oil Company*, 100 S. W. (2d) 1009, and others which deal with the location of boundaries, when the right of an innocent purchaser has not intervened. We have read all of the cited cases and not one discloses that the court held a deed could be reformed by deleting a call for an adjoinder without pleading and proving the rights of an innocent purchaser had not intervened. To take each case they cite and discuss the court's holding would unduly lengthen this reply brief. Suffice to say though, the same authorities were cited by respondents in the Circuit Court of Appeals and the court brushed them aside, holding that the turning point in the case was on whom rested the burden of proving petitioner was a bona fide purchaser *vel non*.

Sight is not to be lost of the fact that respondents plead they had made a mistake in inserting the call

for the Davis corner in the partition deed; nor of the fact that the trial court found that the location of the Wiley Davis Northeast corner was on the ground at the place contended by petitioner, and that its location was known to the Rogers heirs at the time the survey was made in 1899. This is necessarily the court's holding (R. 63).

In order to further have equitable grounds upon which to correct the alleged mistake, respondents plead and testified that the surveyor set a stake at the Northwest corner of the tract partitioned to J. F. Rogers, and another stake at the Southwest corner of said tract, but the trial court found that no mention was made of these stakes in the partition deed (R. 64, ¶ VIII), and that the gear shaft which later replaced the stake at the Southwest corner of said tract was not mentioned in any conveyances introduced in evidence by petitioner in its chain of title. (R. 64, ¶ IX.)

To further vary the terms of the partition deed, respondents were permitted to testify that they omitted the 66 foot strip from the partition because they desired to use it for a road. Having plead the mistake, and averring the manner in which the mistake was made, the trial court permitted the introduction of the testimony over petitioner's objection, and found, based thereon, a mistake was made in inserting the call for the Wiley Davis Northeast corner. When petitioner challenged the admissibility of such testimony in the Circuit Court of Appeals, the court said:

> "In the present cause the scope of the admissible evidence is enlarged by the pleaded issue that the reference to the Wiley Davis corner got into the deed by mistake. On that issue, the case being in equity, parol and extrinsic evidence of what was done and said was plainly admissible."

In not one case cited by respondents did the courts of Texas hold that such a mistake could be corrected against innocent purchasers under pleadings as broad as the issues made by respondents in the trial court.

Petitioner, in its brief in the Circuit Court of Appeals, to sustain its contention that respondents' mistake could not be corrected unless they plead and proved petitioner had notice thereof before it acquired its title to the oil and gas leasehold estate, relied upon, among other cases, *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69. Since the Circuit Court of Appeals held that the burden of proof in a case was a matter of procedural law and not substantive law we did not, in our brief in this court, discuss at great length the opinion of *Garrison v. Crowell*, which announces the rule that a call for an adjoinder mistakenly inserted in a deed will not be deleted unless the party seeking to reform the deed proves that a subsequent purchaser knew of such mistake. The Circuit Court said that the Texas rule placing the burden of proof on the holder of the equitable title to plead and prove the holder of the legal title was not a bona fide purchaser, was exceptional and against the abundance of authorities in other states, and would not be followed by a Federal Court since it did not create substantive

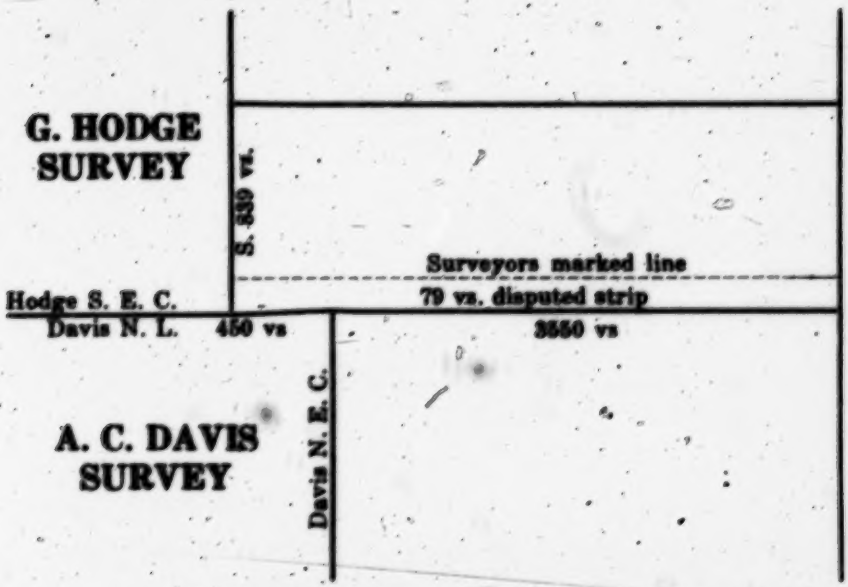
rights, but only procedural rules established by court decisions and not by statute. The question therefore decided was that the Federal Court would not follow the Texas rule, and we saw no benefit to be derived by extending in our brief in this court the discussion of the Texas rule announced in *Garrison v. Crowell*, because, if Federal Courts are not required to follow such state decisions, then they become immaterial.

The following is a reproduction from our brief in the Circuit Court of Appeals of the discussion of the Texas rule, with an addition at the end of the discussion of *Garrison v. Crowell*, a paraphrase of the decision of the Circuit Court in the intsant case and of the Supreme Court of Texas in *Garrison v. Crowell.*

Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69, was written by Associate Justice Gaines, one of the greatest Judges in Texas Jurisprudence at a time when the court was composed of Chief Justice Willie and Associate Justice Stayton.

The facts are very similar to those involved in the case at bar and were as follows: pursuant to a compromise agreement Garrison conveyed to Stephens a tract of land supposedly containing 640 acres. The deed called to begin at the Northwest corner of the tract conveyed and run "*South 839 varas to the Southeast corner of said Hodges survey, on the North boundary line of the A. C. Davis survey.*" This call located the West line of the tract conveyed. The deed called "*thence East at 450 varas, said Davis' Northeast corner at 3550 varas, the East boundary line of said*

Frost survey." This call located the South line of the tract conveyed. The distance called for in the West boundary line of 839 varas did not reach the Davis' survey by some 79 varas but it reached the line actually run at the time the survey was made. The strip lying between the line run by the surveyor and the North boundary line of the Davis tract constituted the area in dispute. We have sketched a plat illustrating the questions of boundary decided by Associate Justice Stayton:



Sometime after the conveyance Stephens, the grantee, moved his fence upon the most Southern line, being the true line of the Davis survey, and took actual possession of the disputed line. Stephens subsequently sold the land to Crowell, who was the Appellee before the Supreme Court. Garrison sued Crowell for the 79 varas strip *upon the theory that the survey*

stopped at the called distance of 839 varas and a line was marked for the South line of the tract conveyed and such line did not coincide with the Davis line. We therefore see that (a) an actual survey was made on the ground and the South boundary line as surveyed was distinctly marked on the ground 79 varas North of the Davis line called for; (b) the surveyor and parties had erroneously thought that the line they marked was the North line of the Davis survey and therefore they were mistaken as to the location of the adjoinders called for; (c) Stephens, the grantee, actually entered into possession of the 79 varas strip and built his fence along the true North line of the Davis survey; (d) Crowell purchased the tract from Stephens, his deed containing the same description as that from Garrison to Stephens; (e) *Crowell had no knowledge that the surveyor had stopped short of the adjoining calls a distance of 79 varas and hacked the South line 79 varas North of the adjoinder called for;* (f) *the hacked line and marked trees were not called for, the deeds calling only for adjoinder and course and distance.*

In holding that Garrison, the original grantor, could not prevail against Crowell the court said:

> **"If it be determined that Crowell is a bona fide purchaser, without notice, of the land in question the judgment must be affirmed without reference to any other question presented by this appeal, and we have no doubt that he must be so held. It does not appear that he knew that the distance of the west line called for in the deed would not reach the Hodges corner and the Davis line;**

therefore, there was nothing on the face of the conveyance to put him upon inquiry as to any claim on the part of appellant. He found Stephens in possession of the premises in controversy, holding under a duly recorded deed from appellant himself, which, according to well established rules of construction, embraced the land so possessed. He paid his money upon the faith of a conveyance which imputed an absolute title in his vendor, at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary which was unknown to him at the time of his purchase. The case of Houston v. Sneed, 15 Texas 307, cited by appellant's counsel, does not sustain the proposition submitted by them upon this point. In that case Sneed was held not to be an innocent purchaser, because, at the time of his conveyance, Houston was in actual possession of the land up to the disputed line. This was considered as constructive notice to him of Houston's claim. But the court say: 'Had there been no settlement up to the agreed line, and no notice to him of it, he might have insisted upon the line originally established between Houston and McKinney called for by his deed.' It is evident that, in so far as the opinion bears upon this case, the authority is against appellant and not in his favor. The court below found against appellant upon the main proposition presented by his pleading; that is, that the Hodges corner and Davis line were called for in the deed by mistake, and we are inclined to think that this finding is correct. But we need not consider that question. Appellee

Crowell being a bona fide purchaser for value, appellant cannot recover." (Pp. 628-629.)

An application of the decision and facts in the *Crowell* case to the case at bar completely emasculates the contentions of Appellees. The only difference in the facts are in favor of Appellants' contentions, and we think our position is even stronger under the court's findings.

First: In the *Crowell* case the surveyor, Garrison and Stephens were mistaken as to the location of the adjoinder. In our case Simmons and the four Rogers heirs knew the location of the Wiley Davis Northeast corner. The mistake in the deed from Garrison to Stephens was as to the actual location of the land described, while in the case at bar if there was any mistake it was not one as to the location of the Wiley Davis Northeast corner, but was in including more land than the heirs intended. We think in this respect our case is stronger than the *Crowell* case and for all the more reason the rights of an innocent purchaser should be protected. Appellees took the position that the surveyor did not know the location of the Wiley Davis corner and if such position was correctly taken, then the facts are identical with the *Crowell* case. We believe though the findings by the court are that the surveyor and the Rogers heirs knew the location of the Davis corner.

Second: In the *Crowell* case, Stephens, the original grantee from Garrison, took possession of the disputed strip and was in possession at the time he conveyed to Crowell. In the case at bar the disputed

strip actually constituted a road and certainly Appellees were not in possession of the road. The fact that Stephens was in possession of the disputed strip negatived the possession of Garrison and therefore there was nothing to charge Crowell with Garrison's claim to the strip. The heirs of Louisa Rogers were not in possession of the road, and when Chandler and Appellant acquired the oil and gas lease there was no possession of Appellees to charge Appellant with notice that Appellees were claiming some interest in the road. On the other hand, Appellant was entitled to rely upon the presumption that the four heirs intended for the title to the road to pass to J. F. Rogers because they did not expressly reserve such title in the partition deed.

Third: In the *Crowell* case the trial court found that the call for adjoinder had not been inserted through mistake, although he found that the surveyor stopped short of the adjoinder 79 varas and marked the South line. The court in the case at bar found that the call for the Wiley Davis Northeast corner was inserted through mistake because he found that the surveyor stopped 66 feet short of the Wiley Davis Northeast corner and marked a line South. Certainly, if there was no mistake in the *Crowell* case, there was none in the case at bar because in following the footsteps of each surveyor the courts found that they stopped short of the adjoinder and marked a line. Justice Gaines brushed aside the finding of the trial court that the adjoinder was called for through mistake, saying:

"but we need not consider that question. Appellee Crowell being a bona fide purchaser for value, Appellant could not recover."

We therefore think that extrinsic evidence was inadmissible and could not form the basis for the decree entered in this case. The court should have concluded as a matter of law Appellant was an innocent purchaser and acquired title to the land adjacent to the Wiley Davis Northeast corner.

CASE AT BAR

"shall the measurement of 440 yards for the North line prevail or shall the call for the Wiley Davis' Northeast corner control?"

"It fairly appears that these lessees paid value in developing the lease, but there is no evidence at all that at the time they paid they did not know that the West line was not the East line of the Davis, or the call for 440 yards on the North line would not reach Davis' corner, rendering the corner questionable."

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"The distance called for in the West boundary line does not reach the Davis survey by some 79 vrs., but does reach the line actually run at the time the survey was made. The strip lying between the latter line and that made by the North boundary line of the Davis tract, and its extension, is the matter of contention in this suit." (67 Tex. 627.)

"If it be determined that Crowell is a bona fide purchaser, without notice, of the land in question, the judgment must be affirmed without reference to any other question presented by this appeal, and we have no doubt that he must be so held. It does not appear that he knew that the distance of the West line called for in the deed

would not reach the Hodges corner and the Davis line; therefore, there was nothing on the face of the conveyance to put him upon inquiry as to any claim on the part of appellant." (67 Tex. 628.)

"There being no proof of bona fides or want of notice, this plea was not sustained.

"But appellant argues that equity will not correct a mistake as against a bona fide purchaser for value without notice, and that there is no proof that it and its predecessors in the lease were not such. The answer is that there is no sufficient proof that they were.

"He paid his money upon the faith of a conveyance which imputed an absolute title in his vendor, at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary which was unknown to him at the time of his purchase." (67 Tex. 628.)

The motion for rehearing asserts that in the Texas courts the rule is established that on an issue of bona fide purchaser for value without notice the burden of proof is upon him who attacks the legal title and asserts the equity, citing White v. Hix, 104 S. W. (2d) 136 and the contention is made that under the ruling in Erie Railway Co. v. Tompkins, the state law should have been applied in this court.

"In 66 Cor. Jur. Vendor and Purchaser, sec. 1063, we find the Texas rule supported

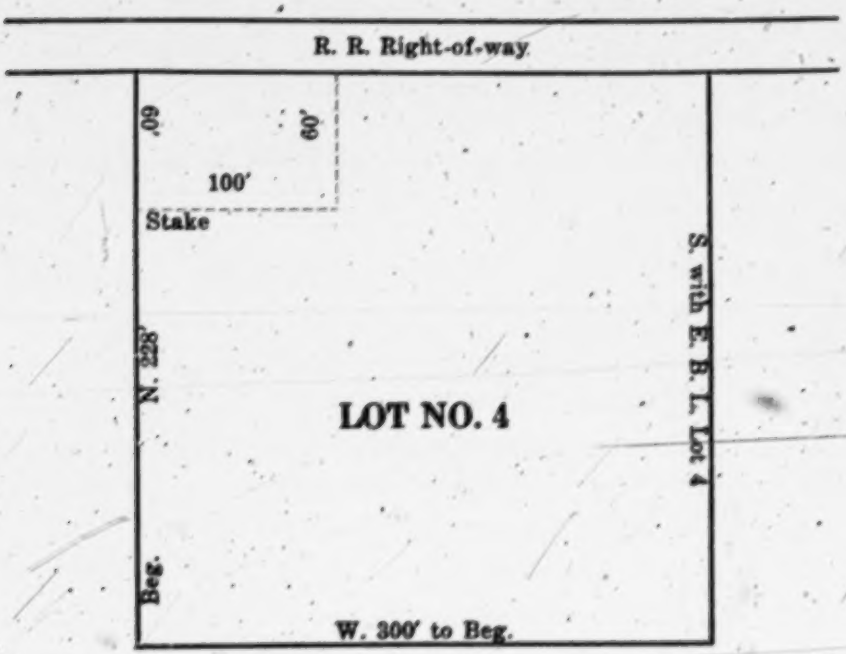
by a multitude of Texas cases stated as above, but as being exceptional."

The *Crowell* case was cited and followed in *Miller v. Southland Insurance Company* (Tex. Civ. App.), 68 S. W. (2d) 558, in which the facts show that P. E. Miller conveyed to Athens Pottery Company, a joint stock association, the following described tract of land:

> "Beginning at the Southwest corner of said Large Lot No. 4;
>
> "Thence North 228 feet a stake for corner;
>
> "Thence in an Easterly direction with the South boundary line of the right of way of the T. & N. O. RR. Co. to a point where said right of way intersects the East boundary line of said Large Lot No. 4, a stake for corner;
>
> "Thence South with the East Boundary line of said Large Lot No. 4, to the Southeast corner of same;
>
> "Thence West 300 feet to place of beginning." (P. 559.)

Later, the Athens Pottery Company, a joint stock association, conveyed by the same description to the Athens Pottery Company, a corporation. The Athens Pottery Company, a corporation, then conveyed to M. K. Miller the land by the same description as in the foregoing deeds. M. K. Miller then conveyed the land by the same description to H. B. Seay in trust to secure payment of certain notes in favor of Southland Life Insurance Company. Miller sued the Southland Life Insurance Company to recover a tract 60

feet x 100 feet out of the Northeast corner of the tract conveyed, contending that the field note description did not cover said tract. On the trial of the case Miller testified that he and his surveyor laid out the tract at the time of the conveyance to the Athens Pottery Company and they had begun at the Souhwest corner and measured North 228 feet to a point 60 feet South of the right of way and set a stake and then they had run Easterly paralleling the right of way 100 feet and then North 60 feet to the right of way, leaving a lot 60 x 100 feet in the corner for his home. He testified that he had no intention to include the lot in the conveyance to the Athens Pottery Company. The plat below illustrates the location of the tract 60 x 100 feet with reference to the larger tract.



Miller sued to reform the deed to the Athens Pottery Company and the deed of trust by excluding the tract 60 x 100 feet. *The evidence showed that the call "thence North 228 feet a stake for corner" did not reach the railroad right of way.* This call did not call for the railroad right of way but actually called for a stake. The next call was *"then in an Easterly direction with the South boundary line of the right of way of the T. & N. O. R. R. Co. to a point where said right of way intersects the East boundary line of said large lot No. 4, a stake for corner."* It was Miller's contention that since the called distance of 228 feet did not reach the right of way by 60 feet the deed was ambiguous and parol testimony was admissible to show that the surveyor stopped at 228 feet and then went East and North, cutting out the lot 60 x 100 feet. It is to be noted that the deed actually called for a stake at 228 feet. The trial court instructed a verdict against Miller and the Court of Civil Appeals on an original hearing reversed and remanded the case but on rehearing affirmed the case after its attention had been called to the *Crowell* case. The court held that the insurance company was an innocent purchaser because it was entitled to rely upon the call for an adjoinder with the railroad right of way and parol evidence was not admissible to show that the surveyor stopped short of the railroad right of way. The court said:

> **"In the present case the residence in the northwest corner of the tract burned some time before the insurance company acquired its lien. M. K. Miller, the borrower, was in possession of the**

> **entire lot from the railway south to the south boundary line. Miller had constructed buildings along the whole of the west line of the property. Appellants' representative inspected the property and there was nothing in its physical aspect or in its occupancy which could have put the insurance company upon notice of any claim adverse to M. K. Miller. Under these circumstances and the authority of the case cited, we hold the insurance company, as a bona fide lienholder without notice, is protected against the adverse claim of title of appellants arising out of the boundary dispute; and, since the jury found the property had been abandoned as a homestead at the time it was conveyed to M. K. Miller, the judgment in favor of the insurance company should be affirmed."** (563.)

The rule that a call for adjoinder will ordinarily be given controlling effect over a call for course and distance is too well settled to require the citation of authorities. An exception to the rule of construction is that when an adjoinder call is inserted through conjecture, or under a mistaken belief as to its location, the call will be rejected and course and distance given effect. *Blake v. Pure Oil Company* (Tex. Com. App.), 100 S. W. (2d) 1009.

The mistake made by the heirs, if any, according to the trial court's findings, was not as to the location of the adjoinder but in including more land than they intended to convey. We do not think the mistake the heirs made is such as would justify the court in deleting the call from the instruments in Appellant's chain of title. Appellees knew the location of the

Wiley Davis Northeast corner and their deed passed the legal title to the tract of land adjacent thereto. When appellant acquired its title it did not know that the heirs had met 66 feet East of the Wiley Davis Northeast corner and decided to leave the strip unpartitioned for a road. There was no ambiguity on the face of the deed and there was no testimony showing Appellant knew at the time it acquired its title that the distance call of 440 yards would not reach the Wiley Davis Northeast corner.

The description in the partition deed and oil and gas lease passed the legal title to the 66 foot strip. In *Swann v. Mills* (Tex. Civ. App.), 219 S. W. 850 (writ dismissed), the facts showed that Ingraham conveyed to Bellamy a tract calling to begin "at the Northwest corner of the said R. E. Neil Survey; thence South 1515 varas to the Southwest corner of said Neil Survey." A survey was made and a line marked by the surveyor where he thought the true West boundary line of the Neil Survey was located but in fact such line was located further West. The court held that since the description called for the survey line the grantee was vested with legal title to the strip of land between the true West boundary line of the Neil Survey and the marked survey line and said in its opinion:

> "* * * Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing

> **the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed."**

If Appellees through mistake inserted the call for the Wiley Davis Northeast corner, intending to omit the 66 foot strip they owned only an equitable title, of which there was no record. Their rights being equitable and Appellant's rights being legal the burden was on them to plead and prove Appellant was not an innocent purchaser. *Teagarden v. Godley Lumber Company*, 105 Tex. 616, 154 S. W. 973.

After spending much time in attempting to distinguish the case at bar from *Garrison v. Crowell*, respondents finally, on page 34 state:

> "If they ever were the law of this State on this point, which we deny, it is certain that the numerous cases of our Supreme Court itself, recently decided, as above quoted and referred to, effectually relegate them to the realm of abandoned doctrine. But it does appear that, as presented, they mislead the Honorable Circuit Court of Appeals, who apparently accepted them as submitted by petitioner; nevertheless said court cited abundant and more recent authority of our Supreme Court to the contrary."

The doctrine of *Garrison v. Crowell* has never been overruled and has not been abandoned, the case having been cited and followed as late as January 18,

1934, in *Miller v. Southland Life Insurance Company*, supra.

As shown by the assignments of error briefed in the Circuit Court of Appeals, the question was squarely presented on whom the burden of proof rested to establish that petitioner was or was not a bona fide purchaser, and the Circuit Court of Appeals pointedly held that, although if the case had been tried in a court of Texas, the burden would have been on respondents to have proved petitioner was not an innocent purchaser, nevertheless the Texas rule was exceptional, and being a matter of procedure or practice and not a matter of substantive law, would not be followed by a Federal Court.

In briefing the case in this court we devoted a major portion of our discussion to the question of whether the Texas rule was one of procedure or substantive law, and whether it should have been followed by the Circuit Court of Appeals. We believe this is the main issue before the court, and if the Federal Court must follow the state rule on questions of presumptions and burden of proof attended with the purchase of the legal title, then the case must be reversed and judgment rendered for petitioner.

However, irrespective of the decision of the court on this proposition, we believe the case should be reversed and rendered on account of error of the Circuit Court of Appeals in holding that title to the strip set aside for road purposes did not pass to petitioner

because the road was not mentioned in the partition deed and the travel was not over the entire 66 feet.

Respectfully submitted,

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